Central Law Journal.

ST. LOUIS, MO., APRIL 2, 1920.

CONSTRUCTION OF THE EIGHTEENTH AMENDMENT.

The decisions which have been handed down recently touching the subject of national prohibition of the liquor traffic are all based on a construction of the Volstead Act and of the Lever Act and not of the Eighteenth Amendment. The opinion in the recent case of Teigenspan v. Bodine, however, rendered by Judge Rellstab in the United States District Court (Dist. of N. J.) is a full discussion of practically all the objections raised against the validity of this Amendment.

The objections raised were to the Amendment itself and to the Act of Congress providing for its enforcement. These objections were prepared and briefed by Hon. Elihu Root and Mr. William D. Guthrie, both of New York, and will be interesting, no doubt, to lawyers who desire to keep in touch with the manner of attack that is to be made upon the Amendment and upon the legislation passed in pursuance thereof.

The attack is made in two divisions. The first division advances its argument against the "alleged invalidity of the Amendment;" the second, against the "alleged invalidity of the National Prohibition Act." The first division is again divided into the following units: That the Amendment is invalid, first, "because of its subject matter;" second, "because Congress failed to propose the amendment in the only way authorized by Article V;" third, "because the amendment has not been ratified by the requisite number of states." The second division is subdivided as follows: The National Prohibition Act is invalid, first "because the act lacks the *concurrence* of the State of New Jersey;" second, "because its definition of intoxicating liquor is wholly without basis in fact, and, therefore, arbitrary and oppressive;" and third, "because it takes without compensation and destroys plaintiffs non-intoxicating beverages without due process of law in violation of the fifth article of amendment to the Constitution."

The Court in the Feigenspan case fully discusses and denies the efficacy of each point in plaintiff's brief. We can here do no more than quote briefly from the Court's opinion. As the first point of attack upon the validity of the amendment the Court expresses great surprise. The plaintiff's contention was that an amendment to the Constitution must be germane to the purposes of that instrument and in harmony with the nature of the compact entered into between the states and that all other amendments are void. "If the plaintiff is right, says the Court, there is no way to incorporate it and others of like character, into the national organic law, except through revolution. This is so startling a proposition that the judicial mind may be pardoned for not readily acceding to it, and for insisting that only the most convincing reasons will justify its acceptance." The Court further said that "the definition of the word 'amendment' include additions to as well as corrections of matters already treated, and there is nothing in its immediate context (Article V) which suggests that it was used in a restricted sense."

The Court further declared that "the right of the people by their representatives acting in accordance with Article V to write legislation into their organic law is not without precedent. A striking example is found in the thirteenth article of amendment, prohibiting slavery throughout the United States. Abhorrent as it is to us of this day, the doctrine that one human being might have ownership in another and traffic in him as if he were a chattel had a legal basis. * * * By substituting 'Slaves' in the thirteenth amendment for 'intoxicating liquors for beverage purposes' in the eighteenth amendment, we have in legal effect the same kind of mandatory prohibition. Every argument advanced here to deny the power to incorporate the eighteenth amendment into the Constitution could be

applied equally against the power to ordain the thirteenth amendment."

The Court passes the point that the amendment was not properly adopted by Congress with slight comment and indicates that it regarded it as being wholly without merit. The third point was treated as being equally untenable. The ratifications by the requisite number of legislatures cannot be affected by state constitutional provisions imposing further restrictions before an act of the legislature shall be binding, for the reason, as the Court thinks, that the states cannot of their own motion amend the federal Constitution which requires only the assent of the legislature and not of the people of the state.

Judge Rellstab evidently believes, as many lawyers believe, that the strongest point of attack on the 18th Amendment is not as to its validity but upon the construction of the word "concurrent" and the power of Congress to define the term "intoxicating liquors," for on these two points the Court goes into a full and careful analysis of the meaning of the Amendment. As to the meaning of the word "concurrent" the Court says that if it means "acting together" then Congress and the legislatures of the several states would have to agree upon every phase of the intended enforcing legislation. "To impute to Congress," declares the Court, "and the ratifying states such an impracticable purpose in the use of that word, is unthinkable, and such imputation is not to be accepted unless no other meaning of the word is permissible or it clearly appears that such restricted meaning was the only one in the mind of Congress when this section was framed."

The Court believes that the word "concurrent" should have the second signification given in the Century Dictionary: "Contributing to the same event or effect." On this point the Court further said:

"The prohibition of the first section of the amendment is self-executing to the extent that it outlaws the manufacture of and commerce in intoxicating liquors as a beverage throughout the entire nation. It takes no note of state boundaries, whether the prohibited business is carried on exclusively within a state or extends beyond. * * *

"This power so to enforce is granted to both Congress and the states. The word 'concurrent' does not divide the power, but authorizes them both to exercise it by 'appropriate legislation.' * * * The failure of Congress to enact enforcing legislation would not effect the right of the states to do so. * * *

"But when Congress acts to enforce this amendment, its command extends throughout the Union."

In relation to the objection that Congress has no right to define the word "intoxicating," Judge Rellstab holds that it is true only with respect to an unreasonable inclusion in the definition of that which is clearly not intoxicating. But within the rule of reasonableness, Congress, the Court believes, has a wide discretion in defining the terms of a Constitutional Amendment which specifically empowers Congress to enforce the constitutional amendment by suitable legislation. The Court then examines the definition itself and declares that in the light of the expert evidence produced by both parties, the test of one-half of one per cent of alcohol as a test of the intoxicating quality of a liquor "cannot be said to be arbitrary." The scientific test, the Court said, seems to vary according to the physical characteristics of those on whom the test is made and depends on "such a variety of conditions as absolutely to defy exact definition."

NOTES OF IMPORTANT DECISIONS.

LIABILITY OF THE OWNER OF A RESERVOIR FOR BREAKING OUT OF WATERS.—One of the natural rights of every land owner is to have his land free from any unnatural or artificial precipitation of water. And the complementary right also exists to have surface water flow off one's land according to the ordinary course of nature. But when one dams up a stream to make an artificial lake upon his land and the dam breaks and floods the country below, is the owner liable? The Supreme Court of California declared in a re-

cent case that the owner is not liable except for negligence in handling the water, and held that an unprecedented flood which washed away the dam did not make the owner of the reservoir liable in damages. Sutleff v. Sweetwater Water Co., 186 Pac. 766.

In the Sutleff case defendant had erected a dam across the Sweetwater River impounding the waters of the stream. To one side of the stream was a depression a little lower than the dam. Here an earth dike had been thrown up to prevent any possible out-flow of the water at this point. An unprecedented flood in January, 1916, washed away this earth work and precipitated a large volume of water on to plaintiff's land to his serious injury. A judgment for defendant was sustained by the Supreme Court on the theory that one who impounds water in a reservoir is not liable, as an insurer, for the escape of the water. On this point the Court said:

"The defendant's reservoir was a wholly proper and lawful thing, and its existence, maintenance, and use worked no injury to the plaintiff's land, invaded no right of his, and could not for a moment be said to be a nuisance. The proximate and immediate cause of the flooding of the plaintiff's land and its consequent injury was not the existence of the defendant's reservoir or the manner of its maintenance or use, which were wholly lawful and innocuous, but the overwhelming of the reservoir by an agency beyond the defendant's control—in fact in this case beyond human control."

Lawyers are familiar with the old English case of Fletcher v. Rylands, L. R. 1 Exch. 265, cited as a leading case in all the text-books to the broad proposition, found in the opinion of Lord Blackburn, that the person, who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape."

In the Fletcher case defendant had constructed a reservoir, the waters of which broke through the bottom into some ancient underground workings whose existence was unknown, and thence escaped into and flooded the plaintiff's colliery. For this the defendant was held liable regardless of any negligence upon its part.

In the later English case of Nichols v. Marsland, L. R. 2 Ex. Div. 1, the broad proposition of Lord Blackburn was restricted to the facts of that case and held not to make the impounder of waters an insurer against all damages caused by the unforseen release of the waters. In the Nichols case the facts were that a series of dams constructed by the defendant were washed out by an unprecedented flood, and the volume of water so released damaged the plaintiff's property.

The Court distinguished the case of Fletcher v. Rylands by showing that the damage was the direct result of the bringing together of the water while in the Nichols case the proximate cause was not the impounding of the waters (a perfectly lawful act), but the unprecedented flood. This distinction is sound and clearly sustained by the weight of authority.

ELEMENT OF FRAUD IN PROSECUTIONS FOR SENDING FALSE REPRESENTATIONS THROUGH THE MAILS.—Fraud as a basis for a prosecution for using the mails to obtain property by means of false representations is different in one respect from that which constitutes fraud in a civil suit. Under the federal act it is not an essential element of the offense that the victim of the fraudulent scheme should suffer pecuniary loss. Wine v. United States, 260 Fed. 911.

In this case the defendant secured an option on 3,320 acres of land in Texas at $9.22 per acre or $3,000. He wrote two of his friends in Oklahoma that he had secured an option on the land for $58,000 or $17.47 per acre and saying that he could not handle the whole deal but would be glad to join with them in purchasing the property and would pay for half of the land at $17.47 per acre if they would take the other half at the same price. The deal was put through on that basis, after which defendant's false representations were discovered and he was indicted under the provisions of Sec. 215 of the Penal Code (Act of Congress, March 4, 1909, C. 321, 35 Stat. 1130). There was no allegation that the victims of defendant had suffered any pecuniary loss and defendant was not permitted to show that the land was worth the price of $17.47 per acre at which it was sold. In holding that in this respect no error had been committed, the Court of Appeals (8th Cir.) said:

"This statute declares that anyone who devises a scheme 'to defraud,' or 'for obtaining money or property by means of false or fraudulent pretenses, representations or promises,' and uses the mails to execute it, shall be fined or imprisoned. The indictment and the evidence are alike replete with charge and the latter with proof that this defendant devised a scheme to obtain for himself the east ranch free of all cost to himself by means of false and fraudulent pretenses, representations and promises, and that he used the mails to execute that

scheme. This was a plain violation of the literal terms of the statute, and even if this violation had caused no pecuniary loss or damage to Van Dyke or Slifer, the defendant could not escape punishment for so glaring a deceit without a repeal or disregard of this law; and it is the duty of the Court not to repeal or disregard this statute, but to enforce it. This section of the statute does not make damage or loss to the victims of a scheme to defraud, or to obtain money or property by false pretenses, representations or promises, a *sine qua non* of its violation, and such damage or loss is not indispensable to the commission of an offense under it. Harris v. Rosenberger, 145 Fed. 449, 76 C. C. A. 225, 13 L. R. A. (N. S.) 762; Durland v. United States, 161 U. S. 306, 315, 16 Sup. Ct. 508, 40 L. Ed. 709; United States v. New South Farm Co., 241 U. S. 645, 36 Sup. Ct. 505, 60 L. Ed. 890, Ann. Cas. 1917C, 455; Chambers v. United States, 237 Fed. 521, 150, C. C. A. 395."

INJUNCTIONS AGAINST ILLEGAL ACTS OF STRIKING UNION MEN.—There is a noticeable stiffening on the part of the Courts of their orders restraining acts of striking union men. The boycott, the right to picket, while still admitted as abstract rights, are so restricted that practically they no longer exist. This tendency is apparent in the recent case of Thomson Machine Co. v. Brown, 108 Atl. Rep. 116, where the New Jersey Court of Chancery held that even where a strike by plaintiff's employes was unaccompanied by violence, the strikers could be prevented from annoying plaintiff by parading before his place of business with placards asking plaintiff's employes not "to scab," etc. Such acts were in themselves declared to be illegal. On this point the Court said:

"I am still of the opinion that the act of the respondents, maintaining in close proximity to the plant of the complainant a building upon which they maintained placards, upon which were printed statements of the following nature: 'Don't scab. Honest jobs are plenty. Strike at Thomson Mch. Co.,' etc.—distributing generally and handing employes and prospective employes of complainant cards, drawing attention to the fact that there was a strike on, and that those who labored for complainant were scabs, and that complainant was unfair, communicating with users of machinery manufactured by complainant and with labor employed on such machines in the use or repair thereof with the purpose of establishing a boycott, were illegal and should be enjoined. Jonas Glass Co. v. Glass Bottle Blowers' Association, 77 N. J. Eq. 219, 79 Atl. 262, 41 L. R. A. (N. S.) 445; Gompers v. Buck Stove & R. Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874; Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461."

The order was served on the Grand Lodge of Machinists whose headquarters are in Washington. They sought to escape from the order under the rule announced in the case of Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65, L. R. A. 1918C 497. But the Chancellor calls attention to the mistake of defendant's attorney in appearing and defending generally to the merits and not objecting to the jurisdiction until after final argument on the application for preliminary injunction. In the Hitchman case the nonresident defendants appeared specially to object to the jurisdiction.

The order of the Court in the present case affords some valuable suggestions as to what may properly be included in a decree in a case of this kind. The injunction restrained the defendants as follows:

"First. From knowingly and intentionally causing or attempting to cause, by threats, offers, of money, payments of money, offering to pay expenses, or by inducement or persuasion any employe of the complainant under contract to render service to it to break such contract by quitting such service.

"Second. From attempting to cause any person employed by complainant to leave such employment by intimidating or annoying such employes by annoying language, acts or conduct.

"Third. From causing persons willing to be employed by complainant to refrain from so doing by annoying language, acts or conduct.

"Fourth. From inducing, persuading or causing to attempt to induce, persuade or cause the employes of complainant to break their contracts of service with complainant or quit their employment.

"Fifth. From threatening to injure the business of complainant or of any corporation, customer, or person dealing or transacting business or willing to deal and transact business with complainant, by making threats in writing or by words for the purpose of coercing such corporation, customer or person, against his or its will so as not to deal with or transact business with the complainant.

"Sixth. From displaying or circulating cards, placards, pictures or other devices, either printed, painted or written, in any place, reflecting upon the ability of the Thomson Machine Company to make and fulfill contracts, or in any way casting reflection upon the reputation, ability or conduct of the present employes of the Thomson Machine Company, or any of them, or any persons willing to become such employes.

"Seventh. From communicating with the users of the machinery manufactured by complainant or with labor unions whose members work with said machines or on the repair thereof in such manner as to induce or persuade such users to discontinue the use of such machinery and prospective customers to refrain from purchasing such machinery and labor to refuse to work with such machines or on the repair thereof."

SUITS AGAINST RAILROADS UNDER FEDERAL CONTROL.*

It is difficult to understand why an administrative agency of any government should permit uncertainty in the method by which citizens may obtain redress for violations of their rights. A citizen who has by a railroad been injured, or whose property has been taken, either before or since the Federal government assumed the operation of the railroads cannot know with certainty whom to sue. This condition has been produced by orders of the Director General of Railroads.

About a year ago the *Central Law Journal* published opposing views of the validity and effect of orders of the Director General.[1] In those publications, it was shown that the courts likewise had disagreed; a disagreement still existing in a large number of judicial opinions since rendered.

It is not the purpose of this discussion either to go over ground covered in a former article or to refer to all the decisions that have been made. Suffice it to recall the basic statute and orders and to cite all published Federal and some state court decisions.

The President took control of the railroads by proclamation, in which he said:[2]

"Suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine."

Later Congress enacted a statute in which it was recited, "That the President, having in time of war taken over the possession, use, control, and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers)." and in which there was contained authority for an agreement with the carriers for "just compensation" for use of the roads.

This statute required the making of contracts between each road and the government and provided the conditions of the use. It may be admitted, for the purpose here, that Congress might have taken and operated the railroads, making just compensation, and excluded their owners from all control, or obligations and at the same time declined to permit the citizens to sue the governmental agency so created. Congress did not see fit to deprive the public of rights growing out of this national operation of the railroads, but enacted:[3] "Actions at law, or suits in equity, may be brought by and against such carriers and judgments rendered as provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality, or agency, of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier."

In the contracts authorized by the statute it is provided:[4]

"The Director General shall pay, *or save the company harmless from,* all expenses incident to, or growing out of the possession, operation, and use of the property taken over during Federal control. * * * He shall also pay, *or save the company harmless from* * * * *all judgments, or decrees* that may be recovered or issued against, and all fines and penalties that may be imposed *upon the company by reason of any cause of action arising out of Federal control,* or anything done or omitted in the

*Mr. Watkins, the writer of this article, contributed an article on this same subject which was published in this Journal about a year ago. (88 Cent. L. J., 157.) This article was highly commended by our readers. Mr. Watkins is the author of Watkins on Shippers and Carriers, a leading text-book and authority on the subject of which it treats.—Editor.

(1) Henry C. Clark, Vol. 88, p. 100, Feb. 7, 1919; Edgar Watkins, id., 157, Feb. 28, 1919.

(2) Cent. L. J., Vol. 88, p. 157.

(3) Id., p. 158.

(4) United States Railroad Administration Director General of Railroads, Bulletin No. 4. p. 47.

possession, operation, use or control of the company's property during Federal control."

Congress expressly gave the right to sue as thereto "provided by law" and the government and the carriers by contract recognized the right and the government agreed to "save harmless" the carriers from "judgments and decrees" which might result from the exercise of that right. The statute and the contracts expressly annulled any right to limit the bringing of suits otherwise than as theretofore provided by law, if there was such right, contained in the President's proclamation quoted above.

Notwithstanding the statute and the contracts, the Director General ordered that suits should be brought against the Director General of Railroads and not otherwise.[5]

The statutory provision is so clear as to leave no room for construction. Some of the opinions holding valid the orders of the Director General have relied on the decisions of the Supreme Court holding the rate making power of the Director General exclusive over state power to prescribe intrastate rates.[6]

Such decisions have no support from the Supreme Court. The power to sue is expressly reserved "as now provided by law." In the same section the power to fix rates is expressly granted to the President in language as follows:

"That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices."

Other courts have said that the employes now operating the railroads are the agents of the Director General and not of the particular carrier owning the road and equipment. This reasoning disregards the statute and the purpose of Federal control. The purpose of taking over the railroads was to meet war needs by unification of operation, common use of terminals, elimination of unnecessary trains, and related methods having as their object to lessen the waste of energy and increase the effectiveness of the service. The statute did not make the government either owner or lessee, the government is merely an operator. The law, in effect, said to the railroads, "Unity of operation is a war necessity and therefore there shall be one head of the Board of Directors of all railroads." The corporate life was not affected, compensation was provided for, the continued right to file suits was stated and indemnity guaranteed for judgments that might be rendered against carriers. That execution cannot be issued to collect the judgments was a necessary protection, the power to sue existing. The provision for indemnity against judgments has no place in the statute, if there is no right to sue. Suits must precede judgments. Further, if no suit lies, it was unnecessary for Congress to say:

"But no process, mesne or final shall be levied against any property under such Federal control."

The two reasons answered above comprise the chief arguments holding valid the orders of the Director General. The decisions to the contrary are firmly grounded on the letter of the statute.[7]

(5) Id., pp. 334, 335.

(6) Northern P. Ry. Co. v. North Dakota, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. ed. ——.

(7) District Judge Walter Evans, March 2, 1918. Muir v. L. & N. R. Co., 247 Fed. 888: The Director General is "but the head of the Board of Directors of the railroad company, the property of which was taken into possession."

District Judge Trieber, October 22, 1918, Wainwright v. Penn. R. Co., 253 Fed. 459, holding valid the order of the Director General fixing a venue.

District Judge Mayer, June 15, 1918, Cocker v. New York, O. & W. Ry. Co., 253 Fed. 676, holding venue and stay orders (18, 18A. and 26) valid.

District Judge Haight, November 30, 1918, United States v. Metropolitan Lumber Co., 254 Fed. 335, holding that federal control does not suspend Elkins Act or Act to Regulate Commerce.

Judge Manton, June 12, 1918, Harwick v. Penn. R. Co., 254 Fed. 748, Order 26 authorizing stay of proceedings valid.

District Judge Munger, December 27, 1918, Friesen v. Chicago, R. I. & P. Ry. Co., 254 Fed. 875, order fixing venue invalid.

District Judge Munger, January 11, 1919, Rutherford v. Union Pac. R. Co., 254 Fed. 880, holding Director General may be substituted as a defendant in lieu of the carrier.

In Transportation Act, 1920, Congress by Section 206, Paragraph a, has provided that actions at law, suits in equity, and proceedings in admiralty based on causes of action arising out of Federal control shall be brought against an agent to be designated by the President, in that court in which the action might have been brought against such Carrier, had there been no Federal control. This is definite and reference need only be had to state and Federal statutes to determine where suits shall be filed in the future.

Paragraph b of the same section provides a method for service in suits to be filed.

Paragraph c provides how complaints for reparation shall be filed and prosecuted.

In paragraph d, of Section 206, it is provided,

"Actions, suits, proceedings and reparation claims, of the character above described pending at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a)."

Pending actions, suits and proceedings connote the legality thereof. If such actions, suits, or proceedings have not been filed in the proper court and venue, they are not legally "pending."

The question, therefore, of the proper construction of Section 10 of the Federal Control Act is still open.

Congress, in Paragraph g of Section 206 of the Transportation Act, 1920, has furnished further corroboration of the position taken above in this article. By Paragraph g Congress prohibits execution, or process on

District Judge Hand, Feb. 1, 1919, Jensen v. Lehigh Valley R. Co., 255 Fed. 795, denying a motion to substitute the Director General as a defendant and saying: "It is, of course, true that normally we should expect the liabilities to be those of the Director General, who is in control, but Congress has prescribed otherwise."

Circuit Judges Walker and Batts and District Judge Grubb, Feb. 13, 1919, Postal Telegraph-Cable Co. v. Call, 255 Fed. 850, C. C. A., * * * right to condemn land of railroad for use of telegraph company not suspended by federal control. In discussing the controlling statute, that of March 21, 1918, the Court said: "It permits actions at law or in equity to be brought against the carriers, and judgments to be rendered as now provided by law and prohibits the carrier from defending upon the ground that it is an instrumentality or agency of the federal government."

District Judge Reed, April 16, 1919, Dahn v. McAdoo, 256 Fed. 549, holding that the Director General may be sued and that Order No. 50 is valid.

District Judge Beverley D. Evans, May 2, 1919, Southern Cotton Oil Co. v. Atlantic Coast Line R. Co., 257 Fed. 138, holding that service on an employe during federal control was no service on the railroad. See, also, District Judge Call, Wood v. Clyde S. S. Co., 257 Fed. 879.

District Judge West, April 15, 1919, Nueces Valley Townsite v. McAdoo, 257 Fed. 143, injunction improper under Act, March 21, 1918.

District Judge Foster, May 8, 1919, Johnson v. McAdoo, 257 Fed. 757, holding: "It was competent for the federal Director General of Railroads to stipulate in what jurisdiction he might be sued, but his authority to make rules and regulations did not authorize the setting aside of the plain provisions of Act, March 21, 1918 (Comp. St. 1918, § 3115 ¾ a 3115 ¾ p, as to the railroad companies)."

District Judge Foster, May 8, 1919, Witherspoon & Sons v. Postal Tele. & Cable Co., 257 Fed. 758. Suits can be brought against the company, not withstanding federal control.

District Judge Youmans, July 17, 1919, Mardis v. Hines, 258 Fed. 945. No suit can be brought other than against the Director General.

District Judge Lewis, June 25, 1919, Hatcher & Snyder v. Atchison, T. & S. F. Ry. Co., 258 Fed. 952, company not liable for negligence of employe during federal control.

District Judge Westenhaver, October 3, 1919, Haubert v. Baltimore & O. R. Co., 259 Fed. 361, railroads not subject to liability for acts of agents operating them during federal control.

District Judge Westenhaver, October 3, 1919, Smith v. Babcock & Wilcox. Actions to enforce liabilities incurred during Federal Control may be maintained in such courts and only such courts as had jurisdiction in the absence of the Federal Control Act.

Suits against carriers may properly be served on an employe of the railroad, although the railroad is under Federal control. Circuit Court of Appeals, 5th Circuit, January 19, 1920, Vicksburg S. & P. Ry. Co. v. Anderson-Tully Co., 361 Fed. 741-744.

District Judge Van Fleet, August 13, 1919, Nash v. Southern Pac. Co., 260 Fed. 280, Order No. 50 valid and not inconsistent with § 10 of Act, March 21, 1919.

The Supreme Court has held that intrastate rates during federal control cannot be regulated by the states. Northern Pacific v. North Dakota, 250 U. S. 135, 63 L. ed., 39 Sup. Ct. 502.

Lands not used in federal control may be reached by execution. U. S. R. R. Administration v. Burch, 254 Fed. 140.

Suits may continue to be prosecuted against the railroads notwithstanding Order No. 50. Louisville & Nashville R. Co. v. Steel, 202 S. W. 878.

Lavalle v. Northern Pac. Ry. Co., 172 N. W. 918.

McGregor v. Great N. R. Co., 172 N. W. 841.

Gowan v. McAdoo, 173 N. W. 440.

Vaugh v. State, 81 So. Rep. 417.

West v. New York, N. H. & R. Co., 123 N. E. 621.

Orders of Director General do not apply to suits antedating the orders.

Scarborough v. Louisiana Ry. Nav. Co., 82 So. Rep. 286.

Orders not applicable to mandamus proceedings.

Re Morris Avenue Bridge, 174 N. Y. Supp. 682.

Statute, § 10, Act March 21, 1918, authorizing suits against railroads invalid. Shumacher v. Penn. R. Co., 175 N. Y. Supp. 84.

a judgment rendered in favor of individuals where the cause of action grew out of Federal control. If the construction of Section 10 of the Federal Control Act, for which I have contended in this article, is not correct, there could be no execution on a judgment.

Congress has recognized by this legislation the right to sue railroads during Federal control for acts arising out of Federal control, just as such right existed prior to the date of the taking over by the Government of the railroads.

EDGAR WATKINS.

Atlanta, Ga.

THE EVOLUTION OF PROPERTY RIGHTS.*

A consideration of the history, theory and the law of property down and through the annals of history, both sacred and profane, from the days of primeval man whose primitive modes of production were hunting and fishing and the yields thereof were shared in common, then the gradual development of the family and family rights, the roving bands, the clans and later the parcelling of lands held by the overlords with their retainers, the gradual development of individual rights, the separation of property and its recognized ownership, is a most interesting study.

In a study of the evolution of property right we must look first to the fundamental principles and the thing we style property and its development. Production and ownership are so closely associated and intermingled, as it were, with the more modern term capital and the basic term, or foundation, labor that neither can be treated or discussed without the association of the other and the mental picture of the one is synonymous of both.

The term capital is really a modern one, it is a product and the result of labor and one of the first instances of the securing of the thing called capital is illustrated by the story of the crafty savage who possessed two bows and arrows and loaned one of them to a neighbor on condition that he receive one-half of the game slain.

The struggles, and I use the term in its broadest sense, which at times have seemed to the people hopeless, down through the ages of civilization, a continual battle of theory, facts, ideas and ideals have had to do with and have been the guiding force and the resultant end is the law of our modern property rights and a candid perusal and study of the legal lore on this subject might lead to the use of the term, in a very literal sense, the revolution in property rights in place of evolution.

Certain authorities in considering the forms of property both common and private, and in this discussion we will deal with the latter, classify it as follows:

First, (a) Common property of ancient origin, the types of which are the communal lands exposed for centuries past to the ownership of the nobility and the bourgeoisie.

(b) Common property of modern origin administered by the state, comprised under the term Public Service (as the mint, post office, public roads, national libraries, museums, etc.).

Second, Forms of private property, (a) Property of personal appropriation, (b) property-instruments of labor, (c) property-capital.

But through all, from the very beginning of things, there runs a thread of reason and progress, though no doubt at the time, to the individuals then living, it seemed a hopeless tangle. Still we must bear in mind that many of the things and events stamped as perfectly correct and just by the verdict of history when divorced from the heat and prejudice that were associated with the events now seem the most logical solution and conclusion but at the time of their

*This article is by Hon. George H. Wark, one of the three judges of the new Court of Industrial Relations recently established by the legislature of Kansas. We shall be very glad to hear further from Judge Wark, especially with respect to the work of the new tribunal in which all of us are interested.—ED.

occurrence were no doubt construed to be diametrically opposed to all established customs and traditions. With our high degree of civilization and development of government there are now greater chances and opportunities for advancement in any field by orderly and sane legislation, wise executive action and the fairness on the part of our courts, than under the old system of right by force and might.

For long ago man by and through organized society, styled government, found that unless he had law, order and respect for the rights and property of others there could be no government.

The right of ownership and control of property is the first step in the civilization of mankind. And while men give up many of their natural rights and their independence to live under political laws they have given up natural community of goods to live under civil laws, for in the early stages of civilization all property was owned in common. By the first they acquired liberty, by the second property. The public good consists in every man having his individual property which is given him by the civil laws and invariably preserved.

We find that property and law were born together and die together. Before laws were made there was no property. Take away law and property ceases. We cannot have property without law for through law possession ripens into property; this is a true theory but stated thus it is insufficient because there must be just and public order and moral law behind the statute law.

The manner of the distribution of property has for a long time been a favorite topic of discussion with the modern sociologist and schemes without number are suggested to remedy evils, some fancied but many real, which have arisen from it.

It is clear that the fundamental law of supply and demand cannot be set aside, that all men are not created equal when it comes to the ability to acquire property or preserve that which they inherit. It is impossible to deny the laboring man the right to determine the number of hours he shall work and the wages he is willing to accept, that is his privilege and right and likewise no legislation can compel an employer to pay more than he is able to pay or carry on his business at a loss. The price of labor thus becomes the price of everything that labor produces. Legislation is powerless to permanently affect this law of supply and demand and the conditions that we are now facing in the controversy affecting property of every nature and between capital and labor is no new question, in fact it is as old as governments themselves and has always been a factor in the growth and development of property rights and distribution thereof, indeed, it is ages old and these controversies have occurred from a time whence the oldest historical records run not to the contrary.

One of the earliest recorded in the annals of the race is that of the exodus of the Israelites from Egypt which seems to have been a national protest against the oppression of capital and to have possessed the substantial characteristics of a modern strike. How far this revolt was due to the order of Pharaoh that the Israelites should provide their own straw to make bricks and how far to the hereditary adversion of the Jewish race to manual labor we shall never know at least not until we hear the Egyptians' side of the story. It is true they despoiled the Egyptian, a fact not wholly unknown to our modern strikes but there is no evidence that the Israelites ever claimed a proprietorship in the cities they had built or used any violence to prevent others from working at the same rate of wages. The boycott had not then been invoked. The Egyptians are said to have been reluctant to let the strikers go and pursued them across the Red Sea but the pursuit was fruitless and attended by somewhat unpleasant consequences to the pursuers.

A later manifestation of the same spirit was shown by the Romans who in the early days of the republic, driven to despair by the oppressive patricians, withdrew in a body to the sacred hill whence they declared their own terms and obtained the appoint-

ment of Tribunes of the people for their protection from the cruelty of the bourgeoisie. The Romans were pre-eminently an industrious and progressive people. Trade unions and guilds existed from the time of the Kings and were often in trouble with the patricians who though hating the plebian at the same time found him indispensable.

The history of the middle ages is replete with the accounts of conflicts of feudal lords who descended from their castles, waylaid the traveler and plundered him of his property, seized his person and unless ransomed sold him as a slave. The merchant dared not risk his person and property in foreign parts. If shipwrecked it was the universal practice to confiscate his goods and property as belonging to the lord on whose land he was thrown. Indeed for some hundred of years the seas were so infested by pirates and commerce and all kinds of property subjected to such exactions and the crews of shipwrecked vessels were so cruelly treated that intercourse between nations practically ceased, commerce was abandoned and the laws regulating it forgotten or lost.

From this brief analysis it is apparent, first, that strikes so far as being peculiar to modern enterprise, as is generally supposed, are as old as civilization itself, second, that they prevail most extensively in the most enlightened and wealthy communities and as far as being an indication of extreme poverty are equally as frequent in times of general prosperity.

Property exists because it promotes the general welfare and by the general welfare its development is directed. As society has developed there has been a corresponding evolution in the development of property rights, for it is only through law that possession ripens into property and ownership. Public property again into public property, and extensive forms of property make way for intensive forms because all this evolution promotes a general welfare.

As an example or evidence of changes in property rights let us consider some of the irrigation laws of our country. Irrigation in a crude form can be traced back to a period which in our new world would be called a remote past, probably seven hundred years. The Pueblo Indians occupied and irrigated lands long ago, so also did the Mexicans and years before the settlement of the west by the Americans the Spanish missions in California employed irrigation. But these early methods were very largely happy-go-lucky. The use of water was a very extensive one rather than an intensive one and there were no highly developed systems. The Mormons in the middle of the nineteenth century and the colony at Greeley, Colorado, twenty years later began modern irrigation in the United States. Where mere possession existed it had to make way for full property into which it often ripened.

The old common law doctrine of riparian rights stood in the way of the extensive and intensive use of water and in the irrigated sections of our country this doctrine has been abolished either explicitly as in Colorado or by modification through statute law and judicial decisions until it has become essentially a different thing. The doctrine of riparian rights was regarded in England as a "natural right." It seemed to the Englishman a thing right in itself not requiring statute law to establish it, that the owner of land should receive the uninterrupted flow of streams crossing his fields but the so-called natural right has had to yield to the necessities of social co-existence.

Less extensive uses constantly yielded to more and are yielding to more intensive uses. The cattlemen of the plains were satisfied with mere possession for flocks and herds and waged many bloody battles to prevent the development of full property rights by permanent settlers but the general welfare demanded a more intensive tenure and the permanent settler fought a winning fight. The common grazing grounds have for the most part disappeared and the remainder are rapidly dwindling. The Texas Trail of the cattlemen has become a thing of the past.

In considering whether the right of the owner of property, either real or personal, to govern or influence its disposition of ownership after death is a vested right or one not directly dependent on statute, it will be necessary to briefly review the history of this right under the English and American law. The oldest writers upon English law inform us that as some property can be vested in individuals by the right of occupancy it was necessary for the peace of society that this occupancy or ownership should be centered not only in the person possessing but in those persons to whom he should think proper to transfer it, which introduced a doctrine and practice of alienations, gifts and contracts. To leave property without ownership at death and subject to be seized by the first finder or taker would necessarily create an infinite variety of strife and confusion hence the establishment of the testamentary right and the distribution of property upon intestacy which is never spoken of as based upon any so-called rights of the living owner but merely upon the necessity of preserving the peace and well being of the community of which he ceases, upon his death, to be a member.

It is interesting to note that the idea or notion of a will or testament is a creation of the jurisprudence of the Roman and that our Saxon ancestors were strangers to any such conception as that of a will. It was introduced among them by the ecclesiastical power. At that early date, among the northern nations, particularly among the Germans, wills or testaments were neither known or used. The right of making wills and disposing of property in this manner is a creature of the civil state which has permitted it in some countries and denied it in others and everywhere it is permitted by law is subject to different formalities and restrictions in almost every nation and state.

As a concrete example of the growth and development of property rights consider our own state, originally a primeval prairie frequented by roving bands of Indians, then partially by the ability of one tribe to overcome the other and partially by government direction we have the reservations, then government control and the distribution of the land of the state as divided into claims of one hundred and sixty acres each. Treeless claims proved fertile and prosperous farms stocked with personal property, the fee holder having absolute ownership not only of the surface but all that beneath, within comparatively recent years the mineral development of our state has greatly affected and changed the manner of transfer and distribution of the owner's title or interest. In many instances the surface is owned by one party, the oil rights by another, the gas rights by a third and perhaps a fourth interest held by a mortgage. Similar conditions are found in the coal fields of our state.

The past history of property and its development and the rights in its distribution and the present conditions impress one with the fact of the rapid growth and development and constant changes in our social and political system and that matters considered a few years ago as near revolutionary must now be accepted as facts with the right of the state to extend, so to speak, its police power with a broadening view of the state's right to supervise or control property when the public health, welfare and safety are endangered. We wonder whether or not the student of history in the future will not, in the calm verdict of time, see even greater and more substantial growth and variety of property distribution and control of the same than we do in a study of the past.

As a result of the progress of ages we trace through all civilized society the development and growth of property rights and as our courts are the highest and most lofty expression of government so likewise in our modern civilization is the right of the individual to acquire, hold, dispose of and be protected in his property rights and in this we see the power of a fair and just government.

GEORGE H. WARK.

Topeka, Kans.

REPLEVIN—CONTRABAND PROPERTY.

JACKSON v. CITY OF COLUMBIA et al.

217 S. W. 809.

Kansas City Court of Appeals. Missouri.
January 5, 1920.

Courts will not assist a party to regain what he has parted with for an illegal purpose, a principle prevailing where it is attempted to recover that which was intended to be sold in violation of law.

TRIMBLE, J. This is an action in replevin to recover possession of five cases of pint bottles of sealed Elk brand whiskey, thirteen cases of half-pint bottles of the same brand of liquor, and seven barrels of beer. The case was by agreement tried before the Court without a jury. Judgment was rendered "that plaintiff is not entitled to the possession of the personal property described in plaintiff's petition." Plaintiff has appealed.

The main contention is that, under the law and the evidence, the Court was bound to find for plaintiff and could not properly do otherwise. The case, however, is an action at law, and the finding of the Court sitting as a jury stands on appeal as does the verdict of a jury. Consequently, if there is any evidence upon which the finding and judgment can be upheld, they will not be disturbed in the Appellate Court merely upon the ground that they should have been the other way.

Plaintiff, a negro and a convicted violator of the local option law, lived in Columbia. On Sunday morning, August 18, 1918, the defendant Whitesides, city marshal of Columbia, learned from his deputy that a truck load of what he suspected to be intoxicating liquor was being taken into plaintiff's yard. The marshal accosted plaintiff on the street and asked him about it. He denied that any whiskey had been left there, but went with the marshal to plaintiff's home, where the marshal after searching the premises found a shed that was closed and locked but which plaintiff assured him contained nothing but junk and other old things. He denied having a key to the shed, but when the marshal began prying off the hinges to the door plaintiff procured a key and unlocked the door, and the intoxicating liquor was found. Plaintiff denied it was his, saying it belonged to John Miller, another negro in Columbia, also a violator of the liquor laws. The cases of whiskey each bore the name of John Miller as consignee in a shipment from Quincy, Ill., to John Miller at Moberly, Mo.; and there is no dispute but that the shipment was made to Moberly to John Miller, and that Miller together with a man by the name of Gregory brought the liquor and beer from Moberly in a truck and placed it in plaintiff's shed where the marshal found it. It is also beyond dispute that, at the time the shipment to Moberly was made, the plaintiff was in jail serving time for a violation of the local option law.

The marshal took charge of the intoxicating liquor, and plaintiff was arrested and charged with storing of the same for John Miller, to which charge he pleaded guilty and paid a fine of $300 and costs. Afterwards, however, plaintiff claimed that he was the owner of the goods and brought this suit to recover possession of them. He claims that Miller does not own them and has no interest in them; that he had them sent to Moberly consigned to Miller so that the latter could get them and bring them to Columbia for him. He admitted that he had a federal license to sell intoxicants and said he bought the liquor intending to sell it in Columbia. Moberly was at that time a "wet" town, but the local option law was in force at Columbia. Plaintiff offered evidence to show that it was his money that paid for the liquor; and both he and Miller swore the latter had no interest in the goods, but that plaintiff owned them.

If the liquor was Miller's, then the Court was justified in finding against plaintiff on that ground, since it is, and for a long time has been, the law in Missouri that it is a good defense to a replevin suit to show that general ownership is in some one other than the plaintiff. Broadwater v. Darne, 10 Mo. 285; Baker v. Campbell, 32 Mo. App. 529; Moriund v. Johnson, 140 Mo. App. 345, 124 S. W. 80; American Metal Co. v. Daugherty, 204 Mo. 71, 102 S. W. 538; Draper v. Farris, 56 Mo. App. 417, 419. And even if the liquors were owned by plaintiff and Miller jointly, plaintiff could not prevail. Steckman v. Galt State Bank, 126 Mo. App. 664, 105 S. W. 674. And the fact that Miller is making no claim to the liquor does not necessarily change this last-mentioned rule. For good reasons Miller may well desire to disclaim any ownership of or interest in the goods, and on the other hand if he does own or have an interest in them, good reasons exist why such ownership should be recognized and the case decided in strict accordance with the rules governing such fact even though he denies it.

With the evidence in the case that plaintiff denied ownership and asserted that Miller owned them, that plaintiff pleaded guilty and paid a fine for storing the goods for Miller, that plaintiff was in jail when the goods were shipped to Moberly consigned to Miller and Miller got them and brought them to Columbia, and that both plaintiff and Miller were engaged in the business of violating the liquor laws, can it be said the trial court is compelled to believe plaintiff and his witnesses when they say he, and not Miller, owns and is entitled to the possession of the liquor? We do not think so. If the judgment had been the other way, defendants could with almost the same force urge that the Court should have found that Miller owned them and should therefore have upheld the defense. It follows from what we have said that the judgment should be upheld and that there was no error in the modification of plaintiff's instructions 2 and 3 as to the plaintiff's sole ownership.

The plaintiff, while insisting that he was the exclusive owner of the goods, admitted he got them for the purpose and with the intention of selling them in violation of the law. This raises an interesting question whether or not a Court is bound to aid him in obtaining possession of such goods thereby enabling him to violate the law, even though there be no law in Missouri destroying property rights in intoxicating liquors. Courts will not enforce rights arising out of an illegal contract. Oscanyan v. Arms Co., 103 U. S. 261, 26 6 L. Ed. 539; Haggerty v. St. Louis Ice Co., 143 Mo. 238, 44 S. W. 1114, 40 L. R. A. 151, 65 Am. St. Rep. 647; Smith v. Rose, 192 Mo. App. 580, 184 S. W. 910. Nor will they assist a party to regain what he has parted with for an illegal purpose, and the same principle prevails where it is attempted to recover that which was intended to be sold in violation of law. Marienthal v. Shafer, 6 Iowa 223. In Blunk v. Waugh, 32 Okla. 616, 122 Pac. 717, 39 L. R. A. (N. S.) 1093, it was held that—

"If the courts will not open their doors to enforce an illegal contract, we do not think they should lend their aid to enable a person to unlawfully engage in the liquor traffic."

See, also, Robertson v. Porter, 1 Ga. App. 223, 57 S. E. 993; Howe v. Stewart, 40 Vt. 145; Crigler v. Shepler, 79 Kan. 834, 101 Pac. 619, 23 L. R. A. (N. S.) 500. In most, if not all, of these cases, however, there were statutes which either forbade recovery or destroyed property rights in the goods in question. There is no such statute in Missouri, and, on the contrary, sections 4855 and 4856, R. S. 1909, provide that liquors being sold illegally may be taken and held until the prosecutions therefor are ended and the fines paid, and for the selling of such liquors to pay the fines in case they are unpaid.

However, in a case where the plaintiff seeking to recover liquors admits he got them for the purpose of violating the law and the Court is convinced that the result of turning them over to plaintiff will enable him to violate the law, it is an interesting question whether, in such a case, the Court may not withhold its aid and leave the plaintiff "unsanctified by its favor and unaided by its process," even in the absence of a statute forbidding recovery or destroying property rights in the goods sought. It is unnecessary for us to decide this interesting question, however, for the instructions given by the Court do not show that the judgment was based on this ground. As stated before, they show rather that the judgment was reached because the Court did not believe plaintiff was the owner, or at least was not the sole and exclusive owner, of the goods.

The judgment is affirmed.

All concur.

NOTE—*Recovery of Property Intended for Illegal Use.*—The case of Blunk v. Waugh, 32 Okla. 616, 122 Pac. 717, 39 L. R. A. (N. S.) 1093, is not precisely on all fours with the instant case, in that the Blunk case was between the owner or alleged owner and a trespasser. We think, however, the principle therein declared must extend beyond the original parties, for all subsequent parties trace title through them, and a new trespass would stand where the original stood.

The fact that the action of replevin is an action in tort would seem not to derogate from the principle of Courts leaving parties to an illegal contract where they stand, for rights in replevin are based upon the implied duty of an unlawful holder to restore what he withholds. If he withholds under a contract even with a semblance of legality this might defeat replevin, as the semblance of right would create an issue that ought to be resolved, say in trover or for accountability in *assumpsit*. The question is whether Courts will permit an abuse of its jurisdiction or of its process in whatsoever form of action either is invoked. The Blunk case says: "If the Courts will not open their doors to enforce an illegal contract, we do not think they should lend their aid to enable a person to unlawfully engage in the liquor traffic, particularly where the statute provides that 'there shall be no property rights of any kind whatsoever' in any liquors kept or used for illegal purposes."

The real thought in the mind of this annotator is whether, if liquor is bought and put into the possession of a bailee for an illegal purpose or use, unknown to the bailee, and afterwards its possession is demanded from him by the bailor.

And whether, if while it is in the bailee's possession, the illegal intent is conceived or then first revealed to him. In either case, would there be more than one party to the illegal contract?

Thus in Ridgeway v. West, 60 Ind. 371, it was held that in an ordinance to suppress gaming and gaming houses and to destroy instruments and devices of gaming, yet the owner of such devices could maintain replevin for seizure by an officer. But the ordinance was construed not specically to authorize seizure and destruction. Therefore, though the only purpose of retention of such devices might mean an intended illegal use, this did not vest in a city the right of possession as conclusively anticipatory of such purpose.

In Monty v. Anderson, 25 Iowa 383, the ruling went a little further than in the Ridgeway case, and declared that though possession of liquor was in violation of law, yet it retains its character as property until seized in the specific way the law provided for its seizure. The opposite to this view would be to say that "all men may have a right to destroy intoxicating liquor wherever it may be found as a public nuisance." If liquor is contraband as property it is contraband only as to direct proceedings against it.

In Baron v. Arnold, 16 R. I. 22, the same kind of ruling was made, the Court saying the statute "does not render such property open or free booty to anyone who might seize it."

In Donahue v. Maloney, 49 Conn. 163, the statute provided specifically that no owner or possessor should be given an action for recovery of any intoxicating liquor. The Court said knowledge came to it of an intended unlawful use prevented recovery from another. This knowledge by the Court was held to bar right of recovery. It would seem that the Court penalizes such an intent with a kind of forfeiture. This we doubt very greatly to be a good legal principle.

In Robertson v. Porter, 1 Ga. App. 223, 57 S. E. 993, the record does not show that there was any specific authority given to seize for destruction or other disposition of the implements of a gaming house, and the sheriff, defendant in replevin, said retention or possession "is necessary to the continued abatement of said gaming house and nuisance," and its recovery would enable plaintiff to re-establish and continue the nuisance. The Court held that plaintiff's action was not sustainable, saying: "The law has the right of self-defense; it will not by its own strong arm assist in placing into the possession of anyone instrumentalities designed for no other purpose than the breaking of the law." It seems to us that a general principle of this kind, merely reserves power in the law to destroy a *rem* whose possession is directly attacked and not to allow anyone who may take it into his head to act as the law's defender. This would tend to a hurly burly administration, and to a hurly burly abuse of the law. And especially individuals seeking their private advantage should not be allowed to call a thing property in the collection of a claim against an alleged owner. There seems to us an inconsistency as to which no real benefit to the public can be presumed to arise. C.

ITEMS OF PROFESSIONAL INTEREST.

BAR ASSOCIATION MEETINGS FOR 1920—WHEN AND WHERE TO BE HELD.

American—Statler Hotel, St. Louis, Mo., August 25, 26 and 27.

Alabama—Birmingham, April 30 and May 1.

Arkansas—Hot Springs, June 2 and 3.

Georgia—Tybee Island, May 27, 28 and 29.

Illinois—Hotel Sherman, May 28 and 29.

Indiana—Indianapolis, July 7 and 8.

Iowa—Cedar Rapids, June 24 and 25.

Maryland—Hotel Chelsea, Atlantic City, N. J., June 24, 25 and 26.

Michigan—Detroit, June 25 and 26.

Mississippi—Meridian, April 28 and 29.

New Jersey—Atlantic City, June 11 and 12.

North Carolina—Asheville, June 29, 30 and July 1.

South Carolina—Columbia, April 23 and 24.

HUMOR OF THE LAW.

A woman recently selecting a hat at a milliner's asked cautiously: "Is there anything about these feathers that might bring me trouble with the Bird Protection Society?"

"Oh, no, madame," said the milliner.

"But did they not belong to some bird?" persisted the lady.

"Well, madame," returned the milliner, pleasantly, "these feathers are the feathers of a howl, and the howl, you know, madame, seein' as 'ow fond he is of mice, is more of a cat than a bird."—*Tit-Bits.*

The following is told of a late railway magnate and a prominent Philadelphia lawyer. Said the magnate to the lawyer:

"I want to show that this law is unconstitutional. Do you think you can manage it?"

"Easily," answered the lawyer.

"Well, go ahead and get familiar with the case."

"I'm already at home in it. I know my ground perfectly. It's the same law you had me prove was constitutional two years ago."—*Lancaster News Journal.*

The Court—Considering that you are the wife of the prisoner, do you think you are qualified to act as a juror in this case?

The Lady—Well, your honor, if you will only give me a chance I think I can convince the eleven other jurors that he's guilty.—*Life.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Bankruptcy** — General Assignment. — A general assignee, on bankruptcy of the assignor within four months, is not an adverse claimant with respect to his claim for expenses and services, and so entitled to have his rights tested in a plenary suit, since the assignment is itself an act of bankruptcy, and is avoided entirely by bankruptcy proceedings, which vest the court with the right to possession of all the property, which may be recovered in a summary proceeding.—Galbraith v. Vallely, U. S. C. C. A., 261 Fed. 670.

2.——Notice of Claim.—The lien given a subcontractor by Lien Act, § 35, exists from the date of the original contract, but notice of the claim of lien must be given within the time required by statute to preserve and enforce it, so that the liens of subcontractors were not defeated by the adjudication as bankrupts of the original contractors before the statutory notices of the liens of the subcontractors were given.—Pittsburgh Plate Glass Co. v. Kransz, Ill., 125 N. E. 730.

3.——Preference.—In computing the indebtedness of an alleged bankrupt for jurisdictional purposes, claims paid by preferential or fraudulent transfers are to be included.—Boston West Africa Trading Co. v. Quaker City Morocco Co., U. S. C. C. A., 261 Fed. 665.

4. **Bastards**—Paternity.—Evidence in corroboration of the mother on the question of paternity of an illegitimate child is not necessary.—State v. Deike, Minn., 175 N. W. 1000.

5. **Beneficial Associations** — Reinstatement.—Where members of a beneficial association lodge were expelled by action of its grand arbitration committee on charges, a bill for an injunction and for reinstatement is properly dismissed, where it appears that plaintiffs had not appealed from the action of the grand arbitration committee to the supreme arbitration committee, as they were permitted to do by the laws of the organization.—Acri v. Brucia, Pa., 108 Atl. 717.

6. **Bills and Notes**—Consideration.—To be valid and legally enforceable as between the parties, an agreement or undertaking of any kind must be supported by consideration, a rule to which commercial paper, in its indorsement, as well as its execution, affords no exception.—State Sav. Bank of Logan v. Osborn, Ia., 175 N. W. 964.

7.——Good Faith.—A presumption of good faith attaches in favor of the holder, who takes a note for value before maturity; but the presumption is rebuttable.—Naylor v. Lovell, Wash., 186 Pac. 855.

8.——Notice to Transferee.—Where the expression of the holder or transferror's fiduciary character appears from the papers accompanying the note, the purchaser takes it with notice of the transferror's limited authority to negotiate it.—Fidelity Trust Co. v. Fowler, Tex., 217 S. W. 953.

9.——Renewal.—The renewal of a note by giving a new note does not pay the original debt or create a new indebtedness.—Spear v. Olson, Neb., 175 N. W. 1012.

10. **Burglary** — Entry. — Entry into a woman's sleeping apartment by cutting a screen door was burglarious if made for the purpose of rape upon her.—Hays v. State, Tex., 217 S. W. 938.

11. **Brokers** — Producing Purchaser. — A broker, making a sales contract with knowledge of defects in his principals' title, cannot recover compensation upon the purchaser's refusal to complete the purchase, for he has not produced a purchaser willing to buy what he knew his principal had to offer.—Brownell v. Hanson, Wash., 186 Pac. 873.

12. **Carriers of Goods**—Liability to Shipper.—It is the carrier's duty to furnish suitable equipment, and if freight be damaged in consequence of its failure in this particular, it is liable to the shipper therefor.—Pacific Fruit & Produce Co. v. Northern Pac. Ry. Co., Wash., 186 Pac. 852.

13.——Exemption from Liability.—A stipulation exempting a carrier from loss by leakage of the goods is reasonable and enforceable.—Florida Cotton Oil Co. v. Clyde S. S. Co., Mass., 125 N. E. 855.

14.——Special Damages.—If owner of goods would charge carrier with any special dam-

ages, he must have communicated to carrier all facts not ordinarily attending the carriage or the particular character and value of the property.—Florida East Coast Ry. Co. v. Peters, Fla., 83 So. 559.

15.——Warehouseman.—Under a bill of lading providing that "property not removed" within 48 hours after notice of its arrival may be kept in car subject to a reasonable charge for storage and carriers' liability as warehouseman only, etc., carrier was liable as a carrier for loss of goods occurring within 48 hours after notice to consignee, even though consignee broke the seals, accepted the shipment, and began unloading the car.—Mark Owen & Co. v. Michigan Cent. R. Co., Ill., 125 N. E. 767.

16. **Carriers of Live Stock**—Inherent Vice.—The carrier being an insurer is liable for death of a hog in transit unless it died from its own inherent weakness or vice.—Burgher v. Wabash Ry. Co., Mo., 217 S. W. 854.

17. **Charities**—Naked Trustee.—Where land was deeded to a trustee with no active duties to perform for the benefit of the church society, the beneficiary will be regarded as the true owner.—Davis v. Union Meeting House Soc., Vt., 108 Atl. 704.

18.——Perpetuity.—Where the entire annual income of a residuary estate is devised in perpetuity to a city for a public purpose, the legal effect of such a devise operates as a grant to the city of the entire estate, with limitation only as to its use.—Schnack v. City of Larned, Kan., 186 Pac. 1012.

19. **Chattel Mortgages**—Retention of Possession.—Where a chattel mortgagor is permitted to retain possession of a stock of goods and dispose of it in the ordinary course of trade without applying the proceeds to the payment of the mortgage debt, the mortgage is void as to attaching creditors.—Kettenbach v. Walker, Idaho, 156 Pac. 912.

20. **Commerce**—Workmen.—Not every employe of an interstate carrier is engaged in "interstate commerce," but to be so engaged the work of the employe must constitute a real and substantial part of the interstate commerce in which the carrier is engaged; the true test being whether at the time of the injury the employe was engaged in interstate transportation or work so closely related to it as to be practically a part thereof.—Grand Trunk Western Ry. Co. v. Industrial Commission, Ill., 125 N. E. 748.

21. **Contracts**—Moral Obligation. — Without some pre-existing obligation, a mere moral obligation is insufficient to constitute consideration.—Terry v. Terry, Mo., 217 S. W. 842.

22.——Mutuality.—Contract for certain number of cars of gasoline, having been construed by the parties as calling for shipment as ordered during a certain year, the objection of lack of mutuality in that no time was fixed for delivery except as buyers might order, could not be sustained.—American Refining Co. v. Bartman, U. S. C. C. A., 261 Fed. 661.

23.—**Corporations**—Promise of Office. — The promise of president and manager of contracting company in personal charge of the work of tearing down building, that precaution would be taken to protect adjoining building, was binding upon the company.—Huber v. H. R. Douglas, Inc., Conn., 108 Atl. 727.

24.——Subsequent Creditors.—A transfer of property by a corporation in consideration of certain shares of its capital stock, through such transfer might have been void as to existing debts of the corporation, was not void as against subsequent creditors, if not made for the purpose of defrauding those who might become creditors.— Cohen v. George, Ga., 101 S. E. 803.

25.—**Criminal Law**—Drunkeness. — A person, not previously insane from indulgence in liquors, who voluntarily becomes intoxicated to such an extent as to cause unconsciousness of his acts, is not irresponsible for the acts done by him.—Collier v. State, Okla, 186 Pac. 963.

26.——Plea of Guilty.—A plea of guilty made by accused advisedly with full knowledge of his rights and of the consequences amounts to a judicial confession of the crime and a waiver of right to trial by jury.—Batchelor v. State, Ind., 125 N. E. 773.

27.—**Damages**—Physical Examination.—A motion to require plaintiff in a personal injury action to submit to a physical examination is addressed to the sound discretion of the trial court, which discretion is reviewable on appeal and correctable in cases of abuse, but the refusal of such a motion when a reasonable and clear case for examination is presented is such an abuse of discretion as will operate to reverse a judgment.—Lake Erie & W. R. Co. v. Griswold, Ind., 125 N. E. 783.

28.—**Death**—Earning Capacity.—In case of a death claim, it is proper to show the condition of health, earning capacity, age, and habits of the party killed, without pleading those specific facts.—Morton v. Southwestern Telegraph & Telephone Co., Mo., 217 S. W. 831.

29.——Eye Witnesses.—Where both persons in an automobile struck by a train were killed, and there was no eyewitness, the jury can infer, from the instinct of self-preservation, that they looked and listened before going onto the crossing.—Barrett v. Chicago, M. & St. P. Ry. Co., Iowa, 175 N. W. 950.

30.—**Deeds**—Ambiguity.—In construing a deed, the intent should be gathered from a consideration of all the language used after giving some meaning to every word, if reasonably possible, and, if the language is ambiguous, recourse may be had to the practical construction placed upon the deed by the parties.—Town of Gold Bar v. Gold Bar Lumber Co., Wash., 186 Pac. 896.

31.——Natural Love and Affection.—The natural love and affection between a mother and daughter is a sufficient consideration to sustain a conveyance.—Parr v. Campbell, Wash., 186 Pac. 858.

32.——Seal.—A seal prima facie imports consideration, where none is alleged or proved, but is not conclusive of the issue.—Dingle v. Major, S. C., 101 S. E. 836.

33.—**Divorce**—Statute of Limitations.—While lapse of time between the occurence of a ground for divorce and the application therefor may be considered by the jury and, if not satisfactorily explained, may be good ground for refusing divorce, yet the statute of limitations does not apply to bar such action.—Flynn v. Flynn, Ga., 101 S. E. 806.

34.—**Dower**—Executory Contract.—A widow is not entitled to dower in land purchased by her husband by executory contract, as against his grantee.—Corcorren v. Sharum, Ark., 217 S. W. 803.

35.—**Easements**—In Gross.—An easement held by an individual distinct from the ownership of any lands is held in gross, and is, generally speaking, personal to the grantee, and neither assignable nor inheritable.—Saratoga State Waters Corporation v. Pratt, N. Y., 125 N. E. 834.

36.——Prescription.—No mere permissive use, however long continued, can ever ripen into an easement by prescription.—Landrum v. Tyler, Va., 101 S. E. 788.

37.—**Eminent Domain**—Double Damages.—The value of condemned lands, arising from their availability for use in conjunction with other lands not taken, and the loss in value of lands not taken from their availability for use in conjunction with those taken, are wholly separate

and independent matters, and the plaintiff was not subjected to double damages for the taking of the lands by consideration of each.—Yolo Water & Power Co. v. Hudson, Cal., 186 Pac. 772.

38.——Special Damage.—The owner of property not abutting on the part of a street that is closed is entitled to compensation for damage special and peculiar to him, such as the substantial impairment of his right of access.—Denver Union Terminal Ry. Co. v. Glodt, Colo., 186 Pac. 904.

39.—**Equity**—Jurisdiction.—The rule that, once equity has taken jurisdiction of a case, it will retain it for all purposes and dispose of the entire matter is confined to cases where the equity jurisdiction has been rightfully invoked.—Davis v. Union Meeting House, Vt., 108 Atl. 704.

40.—**Estoppel**—Duty to Speak.—Where a mortgagee, prior to making the loan, inquired of a former owner of property as to his rights, such owner held put to the disclosure of any claim then existing in his favor.—Havel v. Costello, Minn., 175 N. W. 1001.

41.—**Executors and Administrators**—Ancillary Administration.—Where ancillary letters of administration have not been issued in other states, the California courts may take jurisdiction of a proceeding seeking an accounting as to moneys and credits located outside the state.—Reed. v. Hollister, Cal., 186 Pac. 819.

42.——Expenses.—It is the duty of executors to resist contest of will in good faith and to use all legal and honorable means to sustain the will, and to this end they have authority to employ counsel and bind the estate for reasonable fees.—McMillen's Ex'rs. v. McElroy, Ky., 217 S. W. 927.

43.—**Fraudulent Conveyances** — Badge of Fraud.—Lack of valuable consideration for a conveyance is a badge of fraud which creditors of the grantor may seize upon as means to compel the grantee to disgorge.—Hamilton v. Cunningham, Ky., 217 S. W. 924.

44.—**Frauds, Statute of**—Oral Option.—Where a mere oral option to buy real estate was given, or offer to sell made in the absence of part performance such option or offer was void under the statute of frauds.—Stewart v. Cadeau, Wash., 186 Pac. 894.

45.—**Gaming**—Gambling Operation.—A contract to operate in grain options to be adjusted according to differences in market value thereof is a gambling operation contrary to public policy and void.—In re Lowe's Estate, Neb., 175 N. W. 1015.

46.—**Gifts**—Inter Vivos.—To constitute a gift inter vivos, there must be an intention on the part of the donor to transfer the title to the property to the donee immediately and irrevocably, accompanied by such delivery as will place the donee in complete possession and control of the same, unless delivery is to a third person for the donee.—Rice v. Bennington County Sav. Bank, Vt. 108 Atl. 708.

47.—**Highways**—Licenses.—A landowner permitting neighbors and occasional strangers to use a road over his property, as a matter of favor and not of right, does not thereby convert the road into a public highway.—Fanning v. Stroman, S. C., 101 S. E. 861.

48.—**Homicide**—Deadly Weapon. — Where one strikes another with a weapon calculated to produce death or serious bodily injury there is an absolute presumption that former intended to kill or seriously injure the latter.—Ware v. State, Texas, 217 S. W. 946.

49.——Self-Defense.—The man who kills another must be without fault in provoking the difficulty, and if he is at fault the right of self-defense is not available.—State v. Brown, S. C., 101 S. E. 847.

50.—**Hospitals**—Private Gain.—A hospital conducted for private gain is liable to a patient for injuries resulting from the negligence of nurses and employes, a patient being generally admitted either under an express or implied obligation to receive reasonable care and attention for his safety such as his mental and physical condition, if known, may require.—Meridian Sanatorium v. Scruggs, Miss., 83 So. 532.

51.—**Infants**—Guardian ad Litem.—Where the court appoints a guardian in a will contest to represent a minor, the apointment is for that purpose only, and the guardian cannot compromise the action.—Nothem v. Vonderharr, Iowa, 175 N. W. 967.

52.—**Insurance**—Antedated Note. — Where insured, who signed an antedated note, upon receiving an antedated life policy, immediately wrote the company that he would not accept an antedated policy, and the company replied that he had agreed to accept such policy and must keep it, and insured said no more about the matter, and did not offer to return the policy, he thereby apparently acquiesced in the situation, and became liable on the note.—Sterling v. Bank of Lily, S. D., 175 N. W. 990.

53.——Conditions in Aplication.—Conditions in application for life insurance made a part of the contract that policy would not take effect until delivered by insurer, and the first premium paid in full, while insured's health was the same as described therein, were not waived by conduct of agent in accepting less than full premium, and in assuring insured's wife while he was fatally sick that the policy was of force and would be paid, and in making out blank proof of death.—Green v. Prudential Ins. Co., Kans., 186 Pac. 970.

54.——Insurable Interest.—One having no insurable interest in the life of another cannot procure a policy of insurance on such life, and a policy so procured is void at its inception.—Hawley v. Aetna Life Ins. Co., Ill., 125 N. E. 707.

55.——Notice of Cancellation.—Where insured was entitled to receive five days' notice in writing of intention to cancel his fire policy, there was no effectual cancellation without such notice given him.—Dallas v. Guardian Fire Ins. Co., S. C., 101 S. E. 859.

56.—**Judgment**—Set-Off.—Relief in equity by setting off one judgment against another is granted, not of right, but in the exercise of discretion, but such discretion is not unregulated by principles.—Beecher v. Peter A. Vogt Mfg. Co., N. Y., 125 N. E. 831.

57.—**Landlord and Tenant**—Re-entry.—Stipulations in lease as to rights of landlord to re-enter, and as to rights of tenant to terminate lease, will be strictly construed against the party for whose benefit they are created, under Civ. Code, § 1442.—Exchange Securities Co. v. Rossini, Cal., 186 Pac. 828.

58.——Repairs.—A landlord who agreed to repair floor of rented premises is liable for the negligent failure of his employe to replace a defective plank in the floor, whereby injury resulted to the tenant.—Pollack v. Perry, Texas, 217 S. W. 967.

59.——Retrospective Operation.—A lease may operate retrospectively from the date of its execution.—Acton Rock Co. v. Pine Utilities Co., Cal., 186 Pac. 809.

60.—**Limitation of Actions** — Acceleration, — Where a contract contains an acceleration clause, positive in its terms and without any optional features in it, a default under said clause renders the entire indebtedness due and the statute of limitations (Comp. St. 1919, § 6609) runs from such default.—Canadian Birkbeck Investment & Savings Co. v. Williamson, Idaho, 186 Pac. 916.

61.—**Malicious Prosecution**—Probable Cause.—Want of probable cause in a malicious prosecution case cannot be inferred from existence of actual malice.—Buhner v. Reusse, Minn., 176 N. W. 1005.

62.—**Master and Servant**—Hours of Service Act.—The fact alone of violation of the Hours of Service Act (Comp. St. §§ 8677-8680) subjects the offending company to the prescribed penalty, and an unlawful intent is not necessary.—U. S. v. Baker, U. S. D. C., 261 Fed. 703.

63.——Joint Action.—An insurance carrier and an injured employe may jointly sue the party negligently causing the injury without a formal reward of workmen's compensation, since the inability to pay the compensation is created by the act, and not by the award.—Moreno v. Los Angeles Transfer Co., Cal., 186 Pac. 800.

64.——Safe Appliance.—In the absence of actual knowledge, a servant may assume that the master has exercised due care to furnish safe appliances and place of work; and if the servant, while in the exercise of ordinary care, suffers an injury from a neglect of that duty, the master is liable.—Walsh v. West Baden Springs Co., Ill., 125 N. E. 727.

65.——Unsafe Tool.—Where the master negligently furnishes a tool that is unsafe, the servant does not assume the risk, unless the defect is so open that any man of ordinary prudence would discover it on casual observation.—Chi-

cago, R. I. & P. Ry. Co. v. Payne, Ark., 217 S. W. 810.

66.——Workmen's Compensation Act.—A quarrel between a watchman and a superintendent, resulting in a homicide, held to arise out of the employment within Workmen's Compensation Act, though personal matters entered into the controversy.—American Smelting & Refining Co. v. Cassil, Neb., 175 N. W. 1021.

67.——Workmen's Compensation Act.—Where a workman without work for a brief space of time went away from his working place a few yards to speak to a fellow workman in the same room, according to a custom in the factory, and was injured when his sleeve was caught by the suction of an unguarded machine, it could not be said as a matter of law that he was beyond the protection of the Employers' Liability and Workmen's Compensation Statute.—Barber v. Jones Shoe Co., N. H., 108 Atl. 690.

68.—**Mortgages** — Assumption of Payment.—Where purchaser of mortgaged premises assumes the payment of the mortgages thereon, he becomes the principal debtor and the original mortgagor becomes only a surety.—First State Bank of Binford v. Arneson, Wash., 186 Pac. 889.

69.——Priority.—Where advances are made by senior mortgagee under provision providing for optional advances with no actual notice of a second mortgagee, the advances extend the scope of the lien; the mortgage as to such advances constituting a new lien or incumbrance.—Atkinson v. Foote, Cal., 186 Pac. 831.

70.——Redemption.—The holder of a sheriff's deed based on the foreclosure of a second mortgage is entitled to redeem from a subsequent sale under a decree foreclosing the first mortgage.—Anderson v. Catlin, Kans., 186 Pac. 1027.

71.—**Municipal Corporations** — Burden on Streets.—Streets cannot be subjected to any other use without the consent of the owners of the fee.—Wilson v. Burress, S. C., 101 S. E. 820.

72.—**Negligence**—Imputability.—Negligence of brother driving a buggy to town to enable his sister to take a train is not imputable to her, the brother not being under sister's control.—Lawler v. Montgomery, Mo., 217 S. W. 856.

73.——Imputability.—One riding in an automobile is barred from recovering for the negligence of a third person if the driver of the automobile is also chargeable with negligence proximately contributing to the accident.—Steinkrause v. Eckstein, Wis., 175 N. W. 988.

74.—**Partnership**—Defined.—A "partnership" is an association of two or more persons for the purpose of carrying on a business together and dividing the profits between them.—King v. Gants, Okla., 186 Pac. 960.

75.——Profits.—A contract whereby plaintiff, furnishing teams, etc., should receive one-half of the net proceeds earned by a mercantile business, it being agreed that defendant was the owner of the business, and that "all the accounts, stocks, and supplies necessary to carry on such business are the sole property of the party of the first part (the defendant) and shall continue so throughout the length of this agreement," except rolling stock to be furnished by plaintiff, held not to create a partnership.—McPherson v. Great Western Milling Co., Cal., 186 Pac. 803.

76.—**Principal and Agent** — Declarations of Agent.—The unsupported declarations of an agent that he is the agent of another is incompetent to prove agency.—Sanders v. Barnwell Lumber Co., S. C., 101 S. E. 860.

77.—**Railroads** — Compulsory Operation. — A company cannot be compelled to operate its railroad where it cannot do so without loss therefrom, though its other business of lumbering be sufficiently remunerative to absorb the loss and make returns on its entire business.—Brooks-Scanlon Co. v. Railroad Co., U. S. S. C., 40 S. Ct. 183.

78.——Warning to Travelers. — Automobilists approaching crossing have a right, if the contrary does not appear, to assume that the railroad employes will give the customary warnings. Barrett v. Chicago, M. & St. P. Ry. Co., Iowa, 175 N. W. 950.

79.—**Rape—Civil Action.**—One upon whom a rape has been committed has a right to settle with the offending party for the injury done her, and may maintain a civil suit to recover damages.—People v. Marx, Ill., 125 N. E. 719.

80.—**Reformation of Instruments**—Mistake.—While in equity a rescission of a contract may be adjudged on the ground of a unilateral mistake in its contents, there must be mutual mistake, or inadvertence, or the excusable mistake of one party and fraud of the other as to agreement on which the minds of the parties have met, in order that a reformation may be adjudged.—Metzger v. Aetna Ins. Co., N. Y., 125 N. E. 814, 227 N. Y. 411.

81.—**Replevin**—Burden of Proof.—Plaintiff in replevin must recover on the strength of his own right, and not on the weakness of defendants.—Jackson v. City of Columbia, Mo., 217 S. W. 869.

82.——Growing Crop.—Growing crops are subject to replevin, without regard to whether they are growing or, having matured, have ceased to derive any nutriment from the soil.—Stephens v. Steckdaub, Mo., 217 S. W. 871.

83.—**Sales**—Acceptance of Option.——An option to purchase, once accepted, becomes a binding contract upon the parties thereto.—Sussman v. Gustav, Wash., 186 Pac. 882.

84.——Cancellation.—A letter: "Please cancel my back orders. I am in a notion of quitting business and leave to Europe to see my people" —sufficiently showed an intent to cancel or countermand all orders for goods that had not been delivered at the time the letter was written.—J. R. Bissell Dry Goods Co. v. Katter, Ark., 217 S. W. 779.

85.—**Searchers and Seizures** — Production of Papers.—Knowledge gained by government's wrongful search and seizure may not, on return by order of the court, of the original articles, be used to call on the owners by subpoenas to produce them; so that they may not be punished for disobeying an order to comply with the subpoenas.—Silverthorne Lumber Co. v. U. S., U. S. S. C., 40 S. Ct. 182.

86.—**Specific Performance**—Merchantable Title. —Equity will not require one to take title under a contract providing for good merchantable title unless it is made to appear that the title which the seller seeks to force upon the buyer is such a title.—Crom v. Henderson, Iowa, 175 N. W. 983.

87.—**Subrogation**—Defined.—Subrogation is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt.—Graham v. Durnbaugh, Cal., 186 Pac. 798.

88.—**Telegraph and Telephone**—Limitation of Liability.—A rule of a telegraph companiy limiting its liability on account of delay in delivery of interstate message to amount received for same held valid and binding.—Klippel v. Western Union Telegraph Co., Kans., 186 Pac. 993.

89.—**Tender**—Unconditional. — It is a correct general rule that every tender by a debtor to a creditor must be absolute and not coupled with conditions, but if the condition interpolated is not prejudicial to the creditor, and is one which the debtor has a right to insist upon, it will not vitiate the tender.—Dozier v. Vizard Inv. Co., Ala., 83 So. 572.

90.—**Trade Marks and Trade Names** — The Change of Name.—Where M. M. Newcomer and others incorporated the M. M. Newcomer Company and later sold the stock and organized a corporation as "Newcomer's New Store," at a location near by, and entered the same or similar business, the latter will be enjoined from the use of the word "Newcomer," evidently adopted by the latter corporaion for the fraudulent purpose of deluding the public and injuring the business of the former.—M. M. Newcomer Co. v. Newcomer's New Store, Tenn., 217 S. W. 822.

91.—**Trusts**—Income.—Stock of subsidiary corporation, purchased out of earnings of holding company accumulated subsequent to creation of trust, go to life beneficiary of stockholder's estate as income, and not to remaindermen as capital.—Macy v. Ladd, N. Y., 125 N. E. 829.

92.—**Usury**—Tender.—Plaintiff seking to have a deed canceled as being infected with usury must tender payment of the principal amount of the debt and lawful interest.—Polite v. Williams, Ga., 101 S. E. 791.

93.—**Wills**—Bequest.—The words of a will, "I give to my sister" named, standing alone, are sufficient to give to the sister an absolute estate.—Dexter v. Young, Mass., 125 N. E. 862.

94.——Probate.—Where an instrument is merely a contingent will and the condition upon which it was to become effective has failed, it cannot be admitted to probate.—Lee v. Kirby, Ky., 217 S. W. 895.

95.——Vested Remainder.—The law leans toward vested remainders.—Boston Safe Deposit & Trust Co. v. Wall., Mass., 125 N. E. 853.